**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

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| NICOLA DEIULIIS, a minor, by his guardian, ANNETTE DEIULIIS, and ANNETTE DEIULIIS in her own right, | ) | |
| Plaintiffs, | ) | Civil Action No. 05-01077 |
| v. | ) | Chief Judge Ambrose |
| BOY SCOUTS OF AMERICA NATIONAL COUNCIL, | ) | |
| Defendant. | ) | |

**MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

Defendant, Boy Scouts of America, National Council ("BSA") respectfully submits this Memorandum in Support of its Motion for Summary Judgment.

**FACTUAL BACKGROUND**

**I. Allegations in Complaint**

The Complaint filed in this matter alleges that the Plaintiff Nicola Deiuliis ("Nicola"), a minor, was severely injured in an automobile accident on August 15, 2004. Concise Statement of Material Facts ("Material Facts"), No. 1. According to the Complaint, the accident occurred when "an agent and/or registered volunteer" of BSA, "while in the course of his duties . . . willfully, recklessly or negligently drove the motor vehicle which he was operating, in which [Nicola] was a passenger, off the roadway and into a ditch and then an embankment." The basis

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for federal subject matter is diversity of citizenship, as Plaintiffs are citizens of Pennsylvania while BSA is a citizen of Texas.

In its answer, BSA has denied all liability and has asserted affirmative defenses of: (i) failure to state a cause of action; (ii) statute of limitations; (iii) lack of personal jurisdiction; and, most significantly for purposes of this Motion; (iv) BSA exercised no dominion or control over the individual who actually drove the motor vehicle in question. Answer, pp. 2-3.

Plaintiffs submitted additional facts as part of the parties' joint report submitted to the Court pursuant to Fed. R. Civ. P. 26(f). Plaintiffs contended that Nicola was injured in a one-vehicle accident that occurred on State Route 366 in Washington Township, Westmoreland County. Material Facts, No. 2. The vehicle in question, a van, was driven by a Mr. Samuel Lombardo, an unpaid volunteer of Troop 903, sponsored by Mount St. Peter Church in New Kensington, Pennsylvania, while returning from a Boy Scouts outing in Ohio Pyle State Park. Id., Nos. 3, 4. Presumably, then, Mr. Lombardo is the alleged "agent and/or registered volunteer" of BSA referenced in the Complaint.

## II. Structure of BSA National and Local Councils

BSA is a not-for-profit corporation created by act of Congress (36 U.S.C. § 30901); Material Facts, No. 6. The purposes of BSA "are to promote, through organization and cooperation with other agencies, the ability of boys to do things for themselves and others, to train them in scoutcraft, and to teach them patriotism, courage, self-reliance and kindred virtues . . . .". 36 U.S.C. § 30902. The National Office of BSA is located in Irving, Texas. Material Facts, No. 7. The events as alleged in this lawsuit took place within The Greater Pittsburgh Council of the BSA. Id., No. 11. The Greater Pittsburgh Council is incorporated under the laws of Pennsylvania and is therefore an entirely separate corporate and legal entity from the BSA. Id., No. 9. BSA does not in any way hire, dismiss or otherwise supervise the employees of Troop 903. Id., No. 13. BSA does not conduct or require any training for its adult volunteers. Id.

### III. Employment Relationship Between Driver of Van and BSA

In sum and substance, there is no "link," direct or indirect, between the driver of the van, Mr. Lombardo, and BSA. Mr. Lombardo worked as an unpaid adult volunteer for Troop 903. Id., No. 4. As an unpaid adult volunteer working specifically with Troop 903, sponsored and operated by Mount St. Peter Church located in New Kensington, Pennsylvania, Mr. Lombardo had no employment or agency relationship whatsoever with BSA. Id., Nos. 4, 5, 11.

## ARGUMENT

### I. Standards for Granting Summary Judgment

Summary judgment is properly granted if, drawing all inferences in favor of the non-moving party, "the pleadings depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Summary judgment may be granted against a party who fails to adduce facts sufficient to establish the existence of any element essential to that party's claim, and upon which that party will bear the burden of proof at trial. See Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

### II. Plaintiffs' *Respondeat Superior* Theory Fails as a Matter of Law as There is No Employer-Employee Relationship Between BSA and Lombardo

Plaintiffs' theory of liability against BSA is premised on the alleged existence of agency relationship between BSA and the driver of the van, Mr. Lombardo. Complaint, ¶ 2. However, as pointed out above, Mr. Lombardo is not, nor ever was, an employee of BSA. Therefore, Plaintiffs' respondeat superior theory fails as a matter of law.

Under the doctrine of respondeat superior, recovery is sought from an employer on the basis of vicarious liability. An employer is vicariously liable for the acts of an employee if that act was committed during the course of and within the scope of employment. Brezinski v. World Truck Transfer, Inc., 755 A.2d 36, 38 (Pa. Super. Ct. 2000). Under Pennsylvania law, a principal/agent relationship exists only where the following are established: (1) manifestation by a principal that an agent shall act for the principal; (2) the agent's understanding of the undertaking; and (3) the parties' understanding that the principal is to be in control of the undertaking. Tribune-Review Publishing Co. v. Westmoreland County Housing Auth., 574 Pa. 661, 674, 833 A.2d 112, 119-20 (2003). In addition, the parties asserting the agency relationship (in this case, Plaintiffs) have the burden of establishing such a relationship. Wilson Area School Dist. v. Skepton, 860 A.2d 625, 630 (Pa. Commw. Ct. 2004) (citations omitted). Here, there is no proof that there was any type of relationship between BSA and Mr. Lombardo, as there was and is no evidence of any understanding that there was to be a principal/agent relationship.

At least one Pennsylvania case has addressed the question of the relationship between BSA, BSA national and local councils, and unpaid volunteers who work with the councils. While not exactly on point, it nevertheless provides a useful framework for analyzing this question. In Gibson v. Blower's Paint Service, 140 Pa. Super. 216, 14 A.2d 154 (1940), the widow of a scoutmaster brought an action against a Local Council of BSA (Allegheny County Council West) for workman's compensation benefits. The scoutmaster was an unpaid volunteer for the particular troop. He died in an automobile accident while transporting camping equipment, using his employer's truck, to a Scout function in Canada involving his particular troop. The Pennsylvania Workmen's Compensation Board denied benefits to the widow, and the Superior Court affirmed the decision. The court's discussion of the relationship between the various entities and the deceased scoutmaster is significant for purposes of this case:

> The testimony is clear that the relationship between [decedent] and the defendant in this appeal was not that of master and servant within the intendment of the Workman's Compensation Law. The position of scout master was not an employment, but a voluntary office gratuitously filled by [decedent] as an expression of his philanthropic interest in boys; and the relation between Troop No. 193, of which he was scout master, and the Allegheny County Council West was not such as to make him an employee of the latter, within the coverage of its workmen's compensation policy, which was confined to its paid employees, and did not include troop scout masters.
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> [The record] shows that the national organization, Boy Scouts of America, generally known as the National Council, is chartered by Congress; that Allegheny County Council West is a local council incorporated under the laws of Pennsylvania; that the Men's Bible Class of Mt. Lebanon United Presbyterian Church applied to the National Council for a charter for a troop, which was approved by the defendant local council, and was granted by the National Council, as Troop No. 193; that the Troop Committee of the Bible Class appointed [decedent] scout master, which was approved by Defendant local council, and a commission as such was issued to him by the National Council; that the defendant council did not appoint him, nor could it dismiss him-the troop committee alone could do that; that his services as scout master were given free, and he received no pay, wages or valuable consideration from the defendant Council for Troop 193, and he was not employed by the defendant council at the time of the accident.

140 Pa. Super. at 226, 14 A.2d at 159. (Emphasis added).

While this case involves a suit against the National Council of the BSA, as opposed to the appropriate local council, the principles set forth in Gibson have been utilized by numerous other courts around the United States in dismissing actions against both the National and local Councils. See, e.g., Golden Spread Council, Inc. # 562 of The Boy Scouts of America v. Akins, 926 S.W.2d 287 (Tex. 1996) (BSA National Council not liable under *respondeat superior* theory for negligence of local council in selecting troop scoutmaster who molested boy); Wilson v. St. Louis Area Council, Boy Scouts of America, 845 S.W.2d 568 (Mo. App. 1992) (local council not vicariously liable for death of scout killed during troop activity); Anderson v. Boy Scouts of America, Inc., 226 Ill. App.3d 440, 589 N.E.2d 892 (1992) (local scouting leader who ran over infant not found to be agent of national or district scout council); M.L. v. Civil Air Patrol, 806 F. Supp. 845 (E.D. Mo. 1992) (BSA National Council not vicariously liable for actions of adult volunteer for molesting scout); Wilson v. Boy Scouts of America, 784 F. Supp. 1422 (E.D. Mo. 1991) (National Council not liable on *respondeat superior* theory for negligence of local adult volunteers who supervised outing during which scout was killed); Mauch v. Kissling, 56 Wash. App. 312, 783 P.2d 601(1989) (scoutmaster who caused scout's death not acting as agent of National Council); McGarr v. Baltimore Area Council, Boy Scouts of America, 74 Md. App. 127, 536 A.2d 728 (1988) (National Council not vicariously liable to scout injured on camping excursion due to alleged negligence of scout master); Souza v. Narragansett Council, Boy Scouts of America, 488 A.2d 713 (R.I. 1985) (scoutmaster had no authority to stop boxing match resulting in scout's injury when scoutmaster was member of another scout troop and was not responsible for supervising matches).

Of the above-cited cases, Akins, Wilson, Civil Air Patrol, Anderson and Mauch deal with the situation presented here, i.e., an action brought by an injured plaintiff against the National

Council based on principles of *respondeat superior*. All of these cases found in favor of BSA. The rationale offered by the district court in Wilson is fairly typical:

> The national organization similarly does not choose or directly supervise the scoutmaster or other volunteers at the troop level. If anything, the relationship is even more remote. Plaintiffs have cited no case law holding BSA vicariously liable for the negligent acts of an unpaid volunteer. When courts have found local council's liable, the negligence occurred at a function actually sponsored and supervised by the liable organization. See Riker v. Boy Scouts of America, 8 A.D.2d 565, 183 N.Y.S.2d 484 (1959) (holding county Boy Scout council liable for actions of volunteer at county council sponsored Scout-O-Rama).

Wilson, 784 F. Supp. at 1425; see also Akins, 926 S.W.2d at 290 ("[T]o place a duty on BSA to screen adult volunteers about whom it has no knowledge and over whom it has little or no control would be a tremendous burden."); Civil Air Patrol, 806 F. Supp. at 849 ("BSA does not and cannot select, retain or hire the troop committee members for the local troop units."); Anderson, 589 N.E.2d at 894-95 ("We find no provisions in the charter, bylaws, rules and regulations promulgated by the BSA, nor can plaintiffs cite to any provisions within these documents, which specifically grant BSA or its district counsels direct supervisory powers over the method or manner in which adult volunteer scout leaders accomplish their tasks.").

The undisputed record here shows that Mr. Lombardo, an unpaid volunteer who was, (viewing the evidence in the light most favorable to Plaintiffs), merely charged with the task of providing transportation for Nicola to attend a local scout outing, had no employment or agency relationship with the BSA National Council. As such, Plaintiffs' theory of liability, based on respondeat superior, must necessarily fail as a matter of law.

## CONCLUSION

For the foregoing reasons, Defendant Boy Scouts of American National Council respectfully requests that the Court grant its motion for summary judgment.

Respectfully submitted,

BURNS, WHITE & HICKTON

BY: ______________________________

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Dated: March 9, 2006

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Memorandum in Support of Motion for Summary Judgment, has been served upon all counsel of record by United States First Class Mail, postage prepaid, this 9th day of March, 2006, addressed as follows:

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